

**REVISED ATTORNEY GENERAL'S  
STATEMENT FOR FINAL  
AUTHORIZATION OF CHANGES TO THE  
FEDERAL RCRA PROGRAM THROUGH JULY 1, 2003**

I hereby certify, pursuant to my authority as Deputy Attorney General assigned to represent the Idaho Department of Environmental Quality (IDEQ) and in accordance with Section 3006(b) of the Resource Conservation and Recovery Act (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 (42 U.S.C. 6901 *et seq.*), and 40 CFR Part 271, that in my opinion, the laws of the State of Idaho provide adequate authority to carry out the revised program set forth in the revised "Program Description" submitted with Idaho's 7/1/01 to 7/1/03 Revised Authorization Application. The specific authorities provided are contained in statutes or rules lawfully adopted and effective at the time this Statement is signed. This certification amends and supplements the Attorney General's Statement dated July 5, 1988, as amended and supplemented by letter dated June 3, 1989 and Attorney General's Statements dated February 13, 1992, December 29, 1994, September 16, 1996, October 3, 1997, April 6, 2001 and September 11, 2002.

**Regulatory Equivalency**

As set forth below, the provisions of the Hazardous Waste Management Act of 1983, Idaho Code §§ 39-4401, *et seq.*, and the Idaho Department of Environmental Quality Rules and Standards for Hazardous Waste, IDAPA 58.01.05.000, *et seq.*, adopted pursuant to that statutory authority, meet federal requirements for equivalency and final authorization. IDAPA 58.01.05.000, *et seq.*, was adopted and effective in the State of Idaho on March 20, 2004, and incorporates by reference all delegable final Federal hazardous waste regulations promulgated as of July 1, 2003 (Idaho Code §§ 39-4401, *et seq.*, 39-106, 67-2402, 67-2406, 39-103, 39-104, 39-105).

The Idaho Department of Environmental Quality also seeks full authorization of the Post Closure Rule promulgated by EPA on October 22, 1998 (63 FR 56710) and incorporated by reference by Idaho on April 5, 2000. At this time, IDEQ seeks authorization for 40 CFR 270.1(c)(7), *Enforceable documents for post-closure care*, 40 CFR 265.121 *Post-closure requirements for facilities that obtain enforceable documents in lieu of post-closure permits*, 40 CFR 265.110(c), and 40 CFR 265.118(c)(4). These provisions are described in the rule preamble at 63 FR 56712 section *a. Post-closure care under alternatives to permits*. IDEQ has previously received authorization for 40 CFR Sections 264.90(f), 264.110(c), 264.140(d), 265.90(f), 265.110(d), and 265.140(d), as described in the rule preamble at 63 FR 56713, *b. Remediation requirements for land-based units with releases to the environment*. IDEQ has also received previous authorization for 40 CFR 270.28, as described in the rule preamble at 63 FR 56713, *c. Post-closure permit information submission requirements*.

IDEQ now seeks authorization for 40 CFR Sections 264.90(e), 264.90(f), 264.110(c), 264.112(b)(8), 264.112(c)(2)(iv), 264.118(b)(4), 264.118(d)(2)(iv), 264.140(d), 265.90(f), 265.110(d), 265.112(b)(8), 265.118(c)(5), 265.140(d), 270.1(c) introduction, and 270.28 where those sections reference the use of enforceable documents.

## **Enforceable Documents for Post-closure Care Authority**

### **I. 40 CFR 271.16 (e)**

40 CFR 271.16 (e) governs what authorities the state must have in order to obtain authorization for the use of enforceable documents for post-closure care. 40 CFR 271.16 (e) provides:

Any State authority used to issue an enforceable document either in lieu of a post-closure permit as provided in 40 CFR 270.1(c)(7), or as a source of alternative requirements for regulated units, as provided under 40 CFR 264.90(f), 264.110(c), 264.140(d), 265.90(d), 265.110(d), and 265.140(d), shall have available the following remedies:

- (1) Authority to sue in courts of competent jurisdiction to enjoin any threatened or continuing violation of the requirements of such documents, as well as authority to compel compliance with requirements for corrective action or other emergency response measures deemed necessary to protect human health and the environment; and
- (2) Authority to access or sue to recover in court civil penalties...

Under Idaho's Environmental Protection and Health Act (EPHA) Idaho Code § 39-108, the legislature gave the Department authority to sue in court to recover civil penalties and enjoin violations. Such authority applies to any enforceable document entered into by the Department. The Department may enter into consent orders to require corrective action and if the terms of the consent order are not met, sue in court. The Department routinely enters into these orders for all of its programs including the Hazardous Waste Program. The Department also has available authority to issue Compliance and Schedule Orders under Idaho code § 39-116.

#### **A. Consent Orders**

Idaho Code § 39-108 provides for administrative enforcement actions which result in entry of a consent order:

- (iv) If the recipient and the director agree on a plan to remedy damage caused by the alleged violation and to assure future compliance, they may enter into a consent order formalizing their agreement. The consent order may include a provision providing for payment of any agreed civil penalty.

The statute also addresses the effect of the consent order:

- (v) Effect of consent order. A consent order shall be effective immediately upon signing by both parties and shall preclude any civil enforcement action for the same alleged violation. If a party does not comply with the terms of the consent order, the director may seek and obtain, in any appropriate district court, specific performance of the consent order and such other relief as authorized in this chapter.

40 CFR 271.16 (e) requires the Department to have the authority to sue in courts of competent jurisdiction to enjoin any threatened or continuing violation of the requirements of such documents. The Hazardous Waste Management Act (HWMA) Idaho Code § 39-4413 and the EPHA, Idaho Code § 39-108 provide the Director with the authority to seek such action in court without first resorting to administrative action. The same subsection also provides that the Director has the authority to compel compliance with requirements for corrective action or other emergency response measures deemed necessary to protect human health and the environment as well as collect civil penalties.

In addition to consent order authority, Idaho Code § 39-116 meets the 271.16 (e) requirement because that statute allows for emergency order authority to compel immediate compliance outside of the judicial process.

#### B. Compliance Schedule and Order Authority

Idaho Code § 39-116. Provides:

COMPLIANCE SCHEDULES. The director shall have the authority to issue compliance schedule orders to any person who is the source of any health hazard, air contaminant, water pollution or solid waste for which regulatory standards have been established, including regulatory standards then in effect or to become effective at a future date or at future successive dates. The purpose of any compliance schedule order shall be to identify and establish appropriate acts and time schedules for interim actions by those persons who are or who will be affected by regulatory standards, such acts and schedules being designed to assure timely compliance by those affected by the regulatory standards...

This provision meets the requirements of 271.16(e) as it is a quick non-judicial method for the Director to immediately require compliance. In the case of a violator who refused to go through post-closure where an imminent health hazard existed, the Director can use this authority to compel compliance with the post-closure rule.

## II. 40 CFR 265.121/Public Participation

The Department must comply with the public participation requirements of 40 CFR 265.121.

40 CFR 265.121 (b)(1) provides:

The Regional Administrator, in issuing enforceable documents under Sec. 265.121 in lieu of permits, will assure a meaningful opportunity for public involvement which, at a minimum, includes public notice and opportunity for public comment:

(i) When the Agency becomes involved in a remediation at the facility as a regulatory or enforcement matter;

In 2000 the Department adopted 265.121 by reference in *its Rules and Standards for Hazardous Waste* at IDAPA 58.01.05.000 et seq. Thus, the Department is already bound by § 265.121

and is required to provide public participation in the event the Department uses alternative authorities in lieu of a post-closure permit. The Department's *Rules* do not indicate what the *process* by which the public participation must be carried out. The process should be no different than the process which the Department uses to ensure public participation in the *Rules* for Decision Making. Those *Rules* are found at IDAPA 58.01.05.013. 40 C.F.R. § 265.121 does not insist on any particular process, only that there be public participation.

### III. 3008 Authorities

The Department has the equivalent of 3008 Authorities.

#### A. 3008 (a) Authority.

42 USC 6928 (a) [SWDA § 3008 (a)] requires that when the administrator has information regarding violation of the subchapter that the Administrator issue an order assessing a civil penalty and require compliance. Alternatively the Administrator is empowered to commence and action directly in Court for appropriate relief which may include injunctive relief.

Idaho Statutes meet this requirement in several ways as was made clear in Idaho's original authorization packet. (See Attorney General's Statement dated July 5, 1988) First, as discussed above, the Department is authorized to issue a Notice of Violation and assess penalties under the EPHA Idaho Code § 39-108 and the HWMA, Idaho Code § 39-4414. Under Idaho Code § 39-116 the Director could also order the violator to effect a cleanup. Finally, under the EPHA, Idaho Code § 39-108 (b) and the HWMA, Idaho Code § 38-4413 (3) the Director is not required to assess penalties or issue orders, but may go straight to a Court to enjoin violations of the EPHA.

Under 3008 (a)(3) the Order must not exceed \$25,000.00 for a single violation. Under Idaho Law the maximum penalty assessed for a hazardous waste violation cannot exceed \$10,000.00 for each violation.

#### B. 3008 (h) Authority.

The Department maintains that because 3008 (h) equivalency isn't required for authorization for the post closure rule for which Idaho is currently authorized, there is no legal reason why the Department needs 3008 (h) equivalency in order to obtain authorization for the use of enforceable documents in lieu of permitting to address post closure care issues. Nonetheless, the Department has 3008 (h) equivalency.

42 USC § 6928 (h) [SWDA § 3008 (h)] addresses hazardous waste releases from permitted facilities (one in Idaho) or a facility in interim status. The statute allows the Administrator to "... issue an order requiring corrective action or such other response measure as he deems necessary to protect human health or the environment..." Alternatively, the Administrator is allowed to proceed directly with a civil action in District Court.

Any 3008 (h) order may also include a suspension or revocation of authorization to operate. Finally, 3008 (h) imposes a fine not to exceed \$25,000.00 if the violator does not comply with the corrective action order.

Idaho authorities address all of these requirements. As discussed above Idaho Code § 39-116 allows the Director to impose Schedule and Criteria Orders for cleanups in cases of hazardous waste releases. Further, Idaho is currently authorized for corrective action. (57 Federal Register 11580). In addition, the Department may proceed directly to court under either the EPHA or the HWMA to enforce any releases into the environment.

Finally, the Department is allowed to suspend or revoke permits (or authorization to operate in the case of interim status facilities) under Idaho's adoption by reference of 40 CFR § 264-265. In addition the Schedule and Criteria statute, Idaho Code § 39-116 and HWMA § 39-4409 allow the Director to suspend authorization to operate. The suspension continues in the event of an appeal to the Board of Environmental Quality until final resolution unless the Board does not stay the suspension.

#### **IV. State CERCLA Authority is Not Required for Enforceable Document Authorization.**

EPA has previously indicated that CERCLA authorities are not absolutely necessary to implement alternative authority authorization.

“EPA recognizes that there are many authorities which could be used to impose or oversee corrective action at any given facility. Typically, these authorities include RCRA orders and permits, state cleanup orders, and voluntary and independent actions. In some cases, CERCLA authorities are available. The Agency is concerned to date, it has not taken full advantage of the work of other programs in the RCRA corrective action program. In principle, EPA believes that when a facility is being adequately addressed it should not matter what authority is used or what Agency is overseeing the cleanups. “(61 FR 19456)

The above referenced Federal Register citation shows that EPA tacitly understands not every state will have its own CERCLA like authorities. There is no requirement anywhere in the Federal Register or the Code of Federal Regulations that indicates a state must have its own CERCLA type laws in order to receive authorization for alternative authorities for post-closure care. Quite the contrary, EPA has recognized that there are “many authorities” that may be appropriate and as long as facility cleanups are adequately being addressed. While Idaho does not have its own CERCLA authority it does have other authorities under the HWMA which can adequately address post-closure care even if the facility is not, like those situations where CERCLA is utilized, subject to RCRA enforcement.

Finally, EPA has not required state CERCLA authority in other states where EPA authorized use of enforceable documents for post-closure care under 40 CFR 265.121. Colorado is currently authorized for 265.121 authority and has no state equivalent of the federal CERCLA law.

## **V. Idaho's Hazardous Waste Management Act Addresses Interim Status Perceived Problems.**

The Department can address corrective action at facilities that either lose their interim status or have never attained such status. For example, there should be no concern about a non-permitted TSD facility that is subject to post closure requirements. If the facility is subject to post closure the Department can require corrective action. Because they are subject to closure requirements the Department could require corrective action facility wide, including any solid waste management units (SWMUs) onsite. The Department would issue a NOV, then require a consent order in which all the requirements of 40 CFR 265.121 are met. If the facility does not enter into a consent order, the Department would use its order authority to require a cleanup. (Idaho Code § 39-116) Alternatively, the Department would issue a Part B call in and if that failed seek the same in court. If there had been one-time or accidental releases prior to RCRA's enactment, RCRA would not normally apply. If that were the situation the Department could still compel cleanup under Idaho Code § 39-4408 as discussed below.

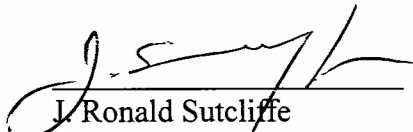
The Department can also require corrective action at a non-permitted facility with a surface impoundment that can't be clean closed. For example, a landfill with units containing listed or characteristic wastes that are not being used for active waste management after the listing or identification effective date could be compelled under Idaho statute to institute corrective action. Those units would not be subject regulation under Part 264 or 265. The inactive units that are located at facilities otherwise subject to Subtitle C interim status or permitting requirements would be SWMUs and subject to corrective action under RCRA § 3004 (u) or 3008 (h). While it is true that in similar situations EPA CERCLA cleanup authorities would normally be utilized, the State of Idaho does not have state CERCLA authority. Idaho does, on the other hand have, Idaho Code § 39-4408. That statute provides:

39-4408. UNAUTHORIZED TREATMENT, STORAGE, RELEASE, USE OR DISPOSAL OF HAZARDOUS WASTE PROHIBITED. (1) No person shall treat or store hazardous waste, nor shall any person discharge, incinerate, release, spill, place, or dispose any hazardous waste in such a manner that the waste, or any constituent thereof, may enter the environment, unless the department has issued said person a permit or a variance as required for the specific activity involved or exempted the activity from permit requirements.

The definition of hazardous waste contained in Idaho Code § 39-4403 is not limited to RCRA wastes. The definition is broad and could be applied to any situation where a waste poses a threat to human health or the environment. Again, in this situation the Department would issue a NOV and require the facility to sign a consent order. If the facility refused to sign a consent order, the Department would use its order authority under § 39-116 or seek injunctive relief in court.

Federal Citation	State Rule Citation (IDAPA)	State Statutory Citation (Idaho Code)	State Analog is:
			Equivalent and/or Broader in Scope
<b>40 CFR Part 260</b> All subparts as of July 1, 2003, except 40 CFR 260.2. For the purposes of 40 CFR 260.20, "Federal Register" shall be defined as the Idaho Administrative Bulletin.	58.01.05.004 Effective 03/20/04	39-4405 Revised as of 2001	Equivalent
<b>40 CFR Part 261</b> All subparts including appendices as of July 1, 2003. Idaho has adopted a state-specific rule which delists chemically stabilized K061 waste at U.S. Ecology of Idaho, Inc.	58.01.05.005 Effective 03/20/04	39-4407 Revised as of 1993	Equivalent
<b>40 CFR Part 262</b> All subparts as of July 1, 2003 and that advance notification, annual reports, and exception reports in accordance with 262.53, 262.55, and 262.56 shall be filed with the EPA Regional Administrator and the Director of IDEQ shall be copied. All references to EPA in 262.51, 262.54(g)(1) and 262.57(b) shall remain defined as EPA. In addition to the Emergency Notification Requirements in 40 CFR 262.34(a)(4), the State Communications Center must also be contacted at 1-800-632-8000.	58.01.05.006 Effective 03/20/04	39-4411 Revised as of 1998	Equivalent
<b>40 CFR Part 263</b> All subparts as of July 1, 2003.	58.01.05.007 Effective 03/20/04	39-4410 Revised as of 2000	Equivalent
<b>40 CFR Part 264</b> All subparts as of July 1, 2003 except 264.149, 264.150, 264.301(l). All references to the Regional Administrator in 264.12(a) shall be defined as the EPA Regional Administrator.	58.01.05.008 Effective 03/20/04	39-4409(3) Revised as of 1988	Equivalent
<b>40 CFR Part 265</b> All subparts except Subpart R, 265.149, 265.150, as of July 1, 2003. All references to the Regional Administrator in 265.12(a) shall be defined as the EPA Regional Administrator.	58.01.05.009 Effective 03/20/04	39-4409(3) Revised as of 1988	Equivalent
<b>40 CFR Part 266</b> All subparts as of July 1, 2003.	58.01.05.010 Effective 03/20/04	39-4405 Revised as of 2001	Equivalent

Federal Citation	State Rule Citation (IDAPA)	State Statutory Citation (Idaho Code)	State Analog is:
			Equivalent and/or Broader in Scope
<b>40 CFR Part 268</b> All subparts except 268.1(e)(3); 268.5; 268.6; 268.42(b); 268.44 (a)-(g) as of July 1, 2003. If the Administrator of EPA grants a case-by-case variance pursuant to 268.5, that variance will simultaneously create the same case-by-case variance in the equivalent Idaho rule.	58.01.05.011 Effective 03/20/04	39-4405 Revised as of 2001 39-4408(4) Revised as of 1986	Equivalent
<b>40 CFR Part 270</b> All subparts as of July 1, 2003. For purposes of 40 CFR 270.2, 270.5, 270.10(e)(2), 270.10(e)(3), 270.10(f)(3), 270.72(a)(5) and 270.72(b)(5), EPA shall remain defined as EPA.	58.01.05.012 Effective 03/20/04	39-4409(3) Revised as of 1988	Equivalent
<b>40 CFR Part 273</b> All Subparts as of July 1, 2003.	58.01.05.016 Effective 03/20/04	39-4405 Revised as of 2001	Equivalent
<b>40 CFR Part 279</b> All subparts as of July 1, 2003.	58.01.05.015 Effective 03/20/04	39-4405 Revised as of 2001	Equivalent
<b>40 CFR Part 124</b> Subparts A and B as of July 1, 2003, except that 40 CFR 124.19, the fourth sentence of 40 CFR 124.31(a), the third sentence of 40 CFR 124.32(a), and the second sentence of 40 CFR 124.33(a) are expressly omitted from the incorporation by reference of each of those subsections. For purposes of 40 CFR 124.6(e), 124.10(b) and 124.10(c)(1)(ii) EPA shall remain defined as EPA.	58.01.05.013 Effective 05/21/04	39-4405(4) Revised as of 2001	Equivalent
<b>RCRA §3005(j)</b>	58.01.05.014 Effective 03/15/02	39-4405 Revised as of 2001	Equivalent
<b>RCRA §3006(f)</b>	58.01.05.997 Effective 04/05/00	9-337, et seq. Revised as of 2004 39-4411(3) Revised as of 1998	Equivalent

  
 J. Ronald Sutcliffe  
 Deputy Attorney General  
 Office of the Attorney General  
 State of Idaho

Dated: September 22, 2004.



# **RCRA CLUSTERS IX, X AND XI REVISED AUTHORIZATION APPLICATION**

## **ADDENDUM TO PROGRAM DESCRIPTION**

**SEPTEMBER 2002**

### **I. SCOPE, STRUCTURE, COVERAGE, AND PROCESSES OF THE IDAHO HAZARDOUS WASTE PROGRAM [40 CFR § 271.6 (a)]**

Idaho Department of Environmental Quality, (Idaho DEQ), intends to continue to operate a hazardous waste program that is consistent with the federal program. Accordingly, the Idaho Hazardous Waste Rules and Standards are amended annually using an adoption by reference process for all delegable federal requirements with approval by the Idaho Legislature, so that the Idaho Hazardous Waste Rules and Standards, IDAPA 58, Title 1, Chapter 5, remain consistent with federal RCRA hazardous waste regulations. The Revised Attorney General's Statement, (Appendix I), supports coverage for all delegable federal hazardous waste regulations promulgated as of July 1, 2001 with exception to part of the Post Closure Rule (63 FR 56710) which Idaho DEQ will defer authorization at this time. The structure and organization of the Idaho DEQ has not changed since department status was granted as of July 1, 2000.

The scope of this program revision includes the requirements of RCRA Clusters IX, X and XI with exception to part of the Post Closure Rule (63 FR 56710). This Program Description Addendum (PD) modifies the February 2001 Addendum to Program Description (Appendix II).

### **II. ORGANIZATION AND STRUCTURE [40 CFR § 271.6(b)]**

The Idaho DEQ Waste Management and Remediation Division is responsible for continued implementation of the Idaho Hazardous Waste Program.

#### **A. Staffing and Funding [40 CFR § 271.6(b)(1)(2)(3)]**

Organization charts have been included in Appendix III. The 2002 annual RCRA Hazardous Waste Grant Workplan and budget sheets have been included in Appendix IV to outline staff, sources of funding and planned hazardous waste activities.

### **III. STATE PROCEDURES [40 CFR § 271.6(c)]**

There have been no changes to state procedures including permitting procedures as outlined in Hazardous Waste Program Summary, dated April, 2000<sup>1</sup>, and the RCRA Memorandum of

---

<sup>1</sup> The Hazardous Waste Program Summary is cited for the purpose of background information and was submitted with the last IDEQ Revised Authorization Application for federal hazardous waste regulations promulgated from July 1, 1996 through June 30, 1998.

Agreement, (MOA), revised 7/30/01, and signed 8/2/01, (Appendix V), which has not been changed and is still in force.

#### **IV. FORMS [40 CFR § 271.6(d)]**

Idaho DEQ uses federal forms for hazardous waste permits, biennial reporting, notification of hazardous waste activity and manifesting of hazardous waste.

#### **V. COMPLIANCE TRACKING AND ENFORCEMENT [40 CFR § 271.6(e)]**

There have been no changes to compliance tracking and enforcement. A complete description of the Idaho DEQ Hazardous Waste Compliance Tracking and Enforcement Program can be found in the Hazardous Waste Program Summary, dated April, 2000, (see footnote 1), and in the RCRA MOA, revised 7/30/01, (Appendix V).

#### **VI. MANIFESTING [40 CFR § 271.6(f)]**

There are no changes to this portion of the program. The Idaho DEQ continues to incorporate by reference and enforce federal manifesting requirements.

#### **VII. GENERATORS, TRANSPORTERS, TSD FACILITIES [40 CFR § 271.6(g)(1)(2)(3)]**

The Idaho Handler Count Activity Report dated September 3, 2002 has been included in Appendix VI to define the numbers of hazardous waste generators, transporters and treatment, storage and disposal (TSD) facilities. The Permitting Six Quarter Plan dated August 19, 2002, has been included to define types and status of hazardous waste permitted facilities and their operating activities in Idaho. (See Appendix VII).

#### **VIII. ANNUAL QUANTITIES OF HAZARDOUS WASTE [40 CFR § 271.6(h)]**

The Idaho Hazardous Waste Management Report, 2001, is the most recent document that describes hazardous waste generation and management in Idaho. It has been included in Appendix VIII.